Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-473

MICHAEL RAY STANDARD - Petitioner-Appellant

versus

HENRY E. COWAN,
Superintendent - - - Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No. _____

MICHAEL RAY STANDARD - *Petitioner-Appellant*

v.

HENRY E. COWAN,
Superintendent - - *Respondent-Appellee*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

Petitioner was convicted of armed robbery, rape, indecent and immoral practices, sodomy, and armed burglary in the Jefferson Circuit Court, Louisville, Kentucky, on September 25, 1974. He appealed that conviction to the then Kentucky Court of Appeals and that conviction was affirmed in a per curiam opinion that was not to be published on September 19, 1975. His petition for rehearing in the Kentucky Court of Appeals was denied on November 14, 1975. A copy of the mandate in the Kentucky Court of Appeals is marked A-1 in the Appendix attached hereto. Petitioner filed a Petition for Writ of Habeas Corpus in

the United States District Court, Western District of Kentucky on January 28, 1976. On March 23, 1977 Charles M. Allen, Judge, United States District Court entered a partial summary judgment for the Respondents with a memorandum opinion attached hereto. Appendix A-2. On September 8, 1977 the District Court entered a final judgment granting the Respondent's summary judgment with reference to all issues. Appendix A-3. That opinion was appealed to the United States Court of Appeals for the Sixth Circuit and their opinion was filed on July 3, 1978 affirming the District Court's denial of the Petition for Writ of Habeas Corpus. Petitioner then filed a Petition for Rehearing En Banc which was denied on August 16, 1978. A copy of those opinions are presented to the court in the Appendix marked A-4.

JURISDICTION

The opinion of the Sixth Circuit Court of Appeals affirming the District Court's denial of the Petition for Writ of Habeas Corpus was rendered and entered on July 3, 1978. The Sixth Circuit's denial of the Petition for Rehearing En Banc was filed on August 16, 1978. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

A. Whether Petitioner's sentence of life without possibility of parole for rape constitutes cruel and unusual punishment when it was the most severe punishment possible at the time of his conviction; and

B. Whether a statement used against Petitioner at his trial was obtained in violation of his Fifth, Sixth, and Fourteenth Amendment Rights under the United States Constitution.

STATEMENT OF THE CASE

The Petitioner, Michael Ray Standard, was indicted by the February 1974 term of the Jefferson County, Kentucky Grand Jury and charged by a seventeen (17) count indictment number 151108. The offenses for which Petitioner was tried are as follows: Count Three (3) of the Indictment charged Petitioner with armed burglary of the dwelling house of Janie Junot; Count Six (6) charged Petitioner with the rape of Janie Junot; Count Eight (8) charged Petitioner with forcing Janie Junot to indulge the indecent and immoral practices; Count Nine (9) charged Petitioner with committing the act of sodomy upon Janie Junot; and Count Ten (10) charged Petitioner with armed robbery of Janie Junot. A trial by jury was held in the Jefferson Circuit Court, Louisville, Kentucky, the Honorable George Kunzman presiding, on September 23rd through the 25th, 1974, on those five (5) counts of the indictment. The jury retired and returned a verdict of guilty on all five (5) charges. The jury fixed the punishment for these convictions as follows: Ten (10) years on the count of armed burglary of the dwelling house; life without possibility of parole on the count of rape; five (5) years on the count of indecent and immoral practices; five (5) years on the count of

sodomy; and a life sentence on the count of armed robbery.

Prior to the trial and prior to an indictment, on February 2, 1974, the police called the Petitioner at his place of work and asked him to come to the station after work. (T.E., p. 110)[1]. When he arrived, Petitioner was asked to stand in a line up, and he did so voluntarily. (T.E., p. 273). When identified by a woman as the man who raped her, Petitioner was arrested. (T.E., p. 274). Petitioner immediately hired an attorney, who informed the police that Petitioner would not make any statements in his absence. (T.E., p. 120). Despite this, the police removed Petitioner from the jail to accompany them on their execution of a search warrant of his home. (T.E., p. 120). During which they obtained a statement used against him in this trial. Petitioner objected to testimony regarding this statement and moved to suppress such testimony. (T.E., p. 119). Petitioner also moved for a mistrial and a continuance based on the fact that the Commonwealth's Attorney had not produced a statement for pre-trial inspection, despite a court order directing such production. (T.E., p. 19).

On September 19, 1975 the Kentucky Court of Appeals affirmed the judgment against Petitioner. On November 14, 1975 the Kentucky Court of Appeals denied a Petition for Rehearing.

On January 28, 1976, Appellant filed a Petition for Writ of Habeas Corpus in the United States District

[1]T.E. refers to pages of the transcript of evidence in State Court that were attached to the original Habeas Corpus petition and are a part of the record.

Court for the Western District of Kentucky at Louisville. On March 23, 1977, a partial summary judgment was granted against Petitioner without an evidentiary hearing. A final summary judgment with reference to all issues was granted without an evidentiary hearing on September 8, 1977.

Petitioner appealed these decisions to the United States Court of Appeals for the Sixth Circuit and on July 3, 1978, that Court entered an opinion affirming the District Court's summary judgment. On August 16, 1978, the Sixth Circuit Court of Appeals denied Petitioner's Petition for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

I. Petitioner's Sentence of Life Without Possibility of Parole for Rape Constitutes Cruel and Unusual Punishment When It Was the Most Severe Punishment Possible At the Time of His Conviction.

In September of 1974 Petitioner was convicted of several offenses, the most serious being rape for which he was sentenced to life without possibility of parole. The alleged victim of this offense was an adult woman who suffered no physical injuries in conjunction with this alleged attack.

In 1972, this court invalidated the death penalty in effect in Georgia in *Furman* v. *Georgia,* 408 U. S. 429, 33 L. Ed. 2d 346, 92 S. Ct. 272 (1972). On that same day, this Court issued a memorandum decisions vacating death penalties in a great number of states including Kentucky. *Williams* v. *Kentucky,* 408 U. S. 938, 33 L. Ed. 2d 759, 92 S. Ct. 2870 (1972). Each one of

these memorandum decisions referred to *Stewart* v. *Massachusetts,* 408 U. S. 845, 33 L. Ed. 2d 744, 92 S. Ct. 2845 (1972), which states the reason behind the vacation of these judgments; "The Appellant in this case was sentenced to death. The imposition in carrying out of the death penalty constitutes cruel and unusual punishment in violation of eighth and fourteenth amendments." *Stewart* then cites *Furman* v. *Georgia* for that proposition. All of these decisions were rendered in June of 1972.

Kentucky's legislature did not pass a new death penalty statute until 1974. Thus, at the time the offense involved here was allegedly committed in November of 1973 and Appellant was tried, there was no death penalty in effect in Kentucky. The next most severe penalty was life without possibility of parole. However, rape of an adult woman was the only crime for which one could receive that penalty. The most severe punishment for a murder was life *with* possibility of parole.

This Court, in *Coker* v. *Georgia,* 433 U. S. 584, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977), stated:

> "It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim."

This language in *Coker* appears to be dispositive of the issue at hand. When the Petitioner is tried and convicted he received the most severe punishment possible under Kentucky law. His sentence is much more severe than that of a deliberate murderer.

The Sixth Circuit Court of Appeals, however, felt that this court's holding in *Schick* v. *Reed,* 419 U. S. 256, 42 L. Ed. 2d 430, 95 S. Ct. 379 (1974) meant that the sentence of life without possibility of parole could never constitute cruel and unusual punishment under the United States Constitution. Petitioner agrees that in and of itself, the no parole clause may or may not offend the Constitution, however, like the death penalty, it may be unconstitutionally applied in certain cases. That is exactly the situation in the present case. Life without parole for rape only, when it is the most severe punishment under the law, is clearly unconstitutional as applied under these circumstances.

As for the factors discussed in *Coker,* in determining the effect of the sentence, Petitioner would like to bring to this Court's attention that if the crime for which the Petitioner was convicted was committed today, he would receive a maximum sentence of ten (10) to twenty (20) years in the penitentiary. Appellant's sentence is excessive and unjust and it is clearly unconstitutional under this Court's reasoning in *Coker.* Petitioner respectfully requests this Court to correct that injustice.

II. A Statement Used Against Petitioner At His Trial Was Obtained in Violation of His Fifth, Sixth, and Fourteenth Amendments Rights Under the United States Constitution.

The Petitioner was convicted of armed burglary, rape, indecent and immoral practices, sodomy, and armed robbery, all arising from a single incident involving one woman. The evidence of guilt against the Petitioner was not overwhelming. The proof against him consisted of a stale eyewitness identification, made some three (3) months after the alleged incident and a statement allegedly made by the Petitioner while in a police car traveling from the jail where he was incarcerated to his home for the alleged purpose of executing a search warrant. There was no scientific proof of any kind, nor were there any other witnesses to the alleged incident.

The facts surrounding the alleged incident are briefly as follows: Appellant had been charged with the crimes listed above. Although he had not yet been indicted, Petitioner had been charged and arraigned. At the time of the arraignment, Counsel for Petitioner advised the police officers that the Petitioner would not be making any statements and he wanted to be advised of any contact the police wanted to have with his client and he would make himself available so that he might be present. The police officers agreed to this request and, in fact, had counsel accompany them and Petitioner to a local hospital so that scientific tests might be made. Thereafter, the police obtained a search warrant for Petitioner's home. They then surreptitiously

removed Petitioner from the jail without notice to his counsel, and took him along when they executed the warrant. There was absolutely no reason why Petitioner had to go along on this trip as he did not have the key to the house and the door had to be broken down in order that they might enter the home. While in the car, Petitioner allegedly made an incriminating statement. Petitioner objected to the use of the statement at trial. The statement allegedly made by the Petitioner was "(H)ave you caught the white man ski mask rapist yet? . . . Well, I'll bet he's scared shitless since you've caught me."

While the Kentucky Court of Appeals opinion did not even address this issue, the United States District Court and the United States Sixth Circuit Court of Appeals stated that the statement was made voluntarily prior to the indictment and was not the product of interrogation or police stimulation. However, trickery by the police can take many forms. This was recognized by this Court in *Brewer* v. *Williams,* 430 U. S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977) and *Massiah* v. *United States,* 377 U. S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964). In *Brewer,* the police elicited a statement from the Defendant by appealing to his religious nature. In *Massiah,* the agent obtained a statement through eavesdropping. In the present case, the alleged statement was made while the officers were supposedly engaging impellent in "small talk" while he was out of the presence of his counsel.

In its opinion, the Sixth Circuit Court of Appeals stated that "on inspection of the records having ascer-

tained with the statement which was introduced at the Petitioner's trial and to which he now objects was made before his indictment and was not the product of interrogation or police stimulation. . . ."

Petitioner believes that the pre-indictment statement issue was disposed of in *Brewer, supra.* The Defendant in that case had been booked, arraigned, and incarcerated, but had not yet been indicted. Yet the court relied on *Massiah,* which seems to indicate that the rights defined in *Massiah* attached prior to indictment or whenever "advisary proceedings have commenced against an individual . . ." (*Brewer,* p. 438). Since *Massiah* controlled in *Brewer* it must be controlling in the instant case as the prosecution had reached the same stage in both cases. Clearly this Court cannot distinguish this case from *Brewer* and *Massiah* on that basis.

Since it is apparent that it does not matter in this case whether or not Appellant had been indicted, we must examine in what manner the statement was obtained.

The United States District Court and the Sixth Circuit Court stated that Petitioner's rights were not violated as the statement was not a product of interrogation or police stimulation. While it may not have been an interrogation as strictly defined, it was clearly obtained through the use of "trickery" or police stimulation. In *Massiah, supra,* the police were not even talking to the Defendant who was out of jail on bond. In that case, the Court held that the Sixth

Amendment prohibits the extraction of incriminating statements from a person without presence of counsel. Obviously, there is no distinction between interrogation and voluntary statements made outside the presence of counsel after a person's Sixth Amendment Rights have attached. In *Brewer, supra,* at page 437, the Court stated "That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant."

Petitioner firmly believes that both the United States District Court and the United States Court of Appeals misunderstood the ramifications of *Brewer* in light of *Massiah, supra,* and ask this Court to examine that analysis and clarify these decisions.

Since this case is not one of clear guilt, the use of this statement might well have been determinative of guilt or innocence. Thus, Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari in this case.

CONCLUSION

The reasons for granting a writ, set forth above, clearly enunciate substantial questions of constitutional law. These issues have led to a great deal of confusion in the lower courts and should be settled by this Court. We urge this Court to grant Certiorari to decide these questions.

Respectfully submitted,

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Member of the Bar of the Supreme Court of the United States

APPENDIX

APPENDIX A-1

COMMONWEALTH OF KENTUCKY

75 Term—September 19, 1975

MICHAEL RAY STANDARD

v.

COMMONWEALTH OF KENTUCKY

Ind. #151108, File #75-60

Appeal from a Judgment of the Jefferson Circuit Court

MANDATE—Issued November 14, 1975

The Court being sufficiently advised, delivered herein an opinion per curiam, and it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

By: (s) Frances Jones Mills, C. C. A.

Issued: November 14, 1975

Appellant's Petition for Rehearing Denied—11/14/75

APPENDIX A-2

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 76-0040 L(A)

MICHAEL RAY STANDARD - - - - *Petitioner*

v.

HENRY E. COWAN, Superintendent, Kentucky State Reformatory - - - - *Respondent*

PARTIAL SUMMARY JUDGMENT
—Filed March 23, 1977

Respondent, having moved for summary judgment, and there being no genuine issue as to any material facts,

IT IS ORDERED AND ADJUDGED that the respondent's motion be and it is hereby sustained as to the admission of an allegedly incriminatory statement made by the petitioner in the absence of his counsel and without *Miranda* warnings, and as to petitioner's claim that a number of errors at the trial court level denied him his Fourteenth Amendment rights to a fair trial.

IT IS FURTHER ORDERED AND ADJUDGED that the Court reserves any decision at this time upon the claim made that the sentence of life without privilege of parole on petitioner's conviction of rape constitutes cruel and inhuman punishment, in violation of the Eighth and Fourteenth Amendments, pending decision by the United States Court

of Appeals for the Sixth Circuit in the cases of *Alton Moore, Jr.* v. *Henry E. Cowan,* No. 76-1859 (6th Circuit); *Edward Earl Stover* v. *Henry E. Cowan,* No. 76-1889 (6th Circuit) and *Donnie Darrell Randolph* v. *Henry Cowan,* No. 76-2378 (6th Circuit).

IT IS FURTHER ORDERED AND ADJUDGED that this is not a final and appealable judgment.

(s) Charles M. Allen

MEMORANDUM OPINION—Filed March 23, 1977

This is an action brought pursuant to 28 U.S.C. Sec. 2254 for a writ of habeas corpus. The respondent has moved to dismiss, which motion we construe as one for a summary judgment, pursuant to Federal Rules of Civil Procedure 12(b). Inasmuch as the petitioner has exhausted available state remedies, and the questions presented raise no issues of material fact, the respondent's motion will be granted in part.

On September 25, 1974, petitioner was convicted in state court of burglary, rape, indecent and immoral practices, sodomy, and armed robbery and was sentenced by the jury to 10 years, life without privilege of parole, 5 years, 5 years, and life, respectively. An appeal to the Kentucky Court of Appeals resulted in an affirmance of the above conviction and sentences on September 19, 1975.

The constitutional violations, which are alleged in the petition and were raised on appeal, are as follows: (1) admission of an incriminatory statement made by the petitioner in the absence of counsel and without *Miranda* warnings violated his Fifth and Fourteenth Amendment right against self-incrimination and his Sixth and Fourteenth Amendment right to counsel;[1] (2) a number of errors at

[1]Although the Sixth Amendment claim was not included in the petitioner's appellate brief, it was expressly raised in his petition for rehearing; therefore, we conclude that this issue was "fairly presented to the Kentucky Court of Appeals. See *Picard* v. *Connor,* 404 U. S. 270 (1971).

trial denied petitioner of his Fourteenth Amendment right to a fair trial; and (3) the sentence of life without privilege of parole on the rape conviction constitutes cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments.

SELF-INCRIMINATION AND RIGHT TO COUNSEL

Insofar as relevant to the first issue and resolving all fact questions in petitioner's favor, the record discloses that he was arrested on or about February 2, 1974, and he retained counsel immediately thereafter. Counsel advised petitioner to make no statements to the police, and on or about February 12, counsel advised the police that petitioner would make no statements and was not to be questioned in his absence. Subsequently, on or about February 13, two police officers, without notifying counsel and pursuant to a search warrant, drove the petitioner from the county jail to his home, where a search was conducted. On the return trip to the county jail, the following conversation took place:

> Petitioner: "I heard that you all caught that ski mask man (rapist)."
>
> Officer Martin: "No we ain't caught him."
>
> Petitioner: "I bet he's scared since you guys caught me in that area."

Prior to this conversation, which was admitted as an incriminatory statement at trial, over objection, petitioner was given no *Miranda* warnings. On the other hand, it is undisputed that this particular exchange was pursuant to a general conversation which did not concern the charges against the petitioner, was not in response to any questioning by the police officers, and occurred prior to his indictment on February 18, 1974.

We hold that the exclusionary rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), does not apply to the statement

made by petitioner, since it did not stem from any "custodial *interrogation*," which was defined in *Miranda*, *supra* at p. 444, as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Moreover, petitioner's reliance on *Williams* v. *Brewer*, 509 F. 2d 227 (8th Cir. 1974), cert. granted, 423 U. S. 1031 (1975), is misplaced, since the Eighth Circuit noted that the "conversation" in which the police engaged the petitioner in that case was directed at the crime with which he was charged and was initiated with the specific purpose of finding out information concerning the whereabouts of the victim of the crime.

Therefore, since the record fails to show, and no allegation has been made, that the conversation preceding petitioner's statement was in any manner related to the crime with which he was charged or designed to elicit incriminating information, or that petitioner's statement was otherwise involuntary, or the product of compulsion exerted by the officers, the Court finds that petitioner's statement was voluntary and that it was not inadmissible under the *Miranda* decision, which reads in pertinent part as follows, *supra* at p. 478:

> "The fundamental import of the privilege against self-incrimination while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated . . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

See, also, *United States* v. *Harris*, 460 F. 2d 1041 (5th Cir.) cert. den., 409 U. S. 877 (1972); *United States* v. *Littlejohn*, 441 F. 2d 26 (10th Cir. 1971).

With regard to petitioner's Sixth Amendment claim, it follows that since his incriminatory statement was not the product of interrogation, petitioner had no right to counsel on the basis of *Miranda, supra; Escobedo* v. *Illinois,* 378 U. S. 478 (1964); and their progency, which hold that custodial interrogation is a crucial stage to which the right to counsel attaches.

Further, the Court notes that the Supreme Court's decisions in *Massiah* v. *United States,* 377 U. S. 201 (1964); *McLeod* v. *Ohio,* 381 U. S. 356, reh. den., 382 U. S. 874 (1965), summarily reversing 1 Ohio St. 2d 60, 203 N. E. 2d 349 (1964), on the authority of *Massiah, supra; Beatty* v. *United States,* 389 U. S. 45 (1967), summarily reversing, 377 F. 2d 181 (5th Cir. 1967), on the authority of *Massiah, supra,* have been interpreted by a number of circuits as holding that the admission of a *post*-indictment incriminatory statement to police officers or their agents in the absence of counsel violates a defendant's Sixth Amendment right to counsel, even though the statement may have been voluntary and not procured by interrogation or deception on the part of the officers or their agents, unless there has been a clear and knowing waiver of that right. See, *Milani* v. *Pate,* 425 F. 2d 6, 7 (7th Cir.), cert. den., 400 U. S. 867 (1970); *United States* v. *Missler,* 414 F. 2d 1293, 1302 (4th Cir. 1969), cert. den., 397 U. S. 913 (1970); *O'Connor* v. *New Jersey,* 405 F. 2d 632, 634 (3rd Cir.), cert. den; *sub nom Yeager* v. *O'Connors,* 395 U. S. 923 (1969); *Hancock* v. *White,* 378 F. 2d 479, 482 (1st Cir. 1967); but see, *United States* v. *DeLoy,* 421 F. 2d 900, 901, 902 (5th Cir. 1970); *United States* v. *Garcia,* 377 F. 2d 321, 324 (2nd Cir.), cert. den., 389 U. S. 991 (1967).

However, no court has held that the exclusionary rule of *Massiah, supra,* applies to *pre*-indictment statements; rather, the circuits that have considered this question have held that, except at custodial interrogatories, there is no Sixth Amendment right to counsel at confrontations between investigatory officers and the accused prior to indictment, *Wallace* v. *United States,* 412 F. 2d 1097, 1101 (D.C. Cir. 1969), cert. den., 402 U. S. 943 (1971); *Caton* v. *United States,* 407 F. 2d 367, 373 (8th Cir.), cert. den., 395 U. S. 984 (1969); *Collins* v. *Wilson,* 368 F. 2d 995, 996-997 (9th Cir. 1966). In light of the Supreme Court's decision in *Kirby* v. *Illinois,* 406 U. S. 682 (1972), we believe this is the correct rule and hold that petitioner's Sixth Amendment right to counsel was not violated by the admission of a pre-indictment incriminatory statement made without the presence of counsel. See, *United States* v. *Lemonakis,* 485 F. 2d 941, 953-954 (D.C. Cir. 1973), cert. den., 415 U. S. 989 (1974).

The Court does observe that while no constitutional right of the petitioner was violated by the admission into evidence of his incriminatory statement, the prosecutor may have violated the ABA Canon of Ethics by using a statement which was obtained at a confrontation between a defendant and a government agent without notice to defendant's retained counsel. See, e.g. *United States* v. *Lemonakis, supra,* at pp. 954-956; *United States* v. *Thomas,* 474 F. 2d 110, 111-112 (10th Cir.) cert. den., 412 U. S. 932 (1973).

FAIR TRIAL

The petitioner next argues that the total effect of the following errors was to deny him of his Fourteenth Amendment right to a fair trial: (1) trial court's refusal to grant petitioner's motion for a continuance based on the prosecutor's failure to disclose petitioner's pre-trial incriminatory statement, in violation of the court's order pursuant to Kentucky Rules of Criminal Procedure 7.24(1)(a); (2) trial court's refusal to declare a mistrial after the prosecutor "paraded victims of other crimes" allegedly committed by the defendant before the jury; (3) trial court's refusal to allow Dr. Templer, a psychologist and expert witness, to testify concerning petitioner's psychological and

mental condition; (4) trial court's refusal to admit the results of a lie detector test, which were favorable to petitioner; (5) various acts of prosecutorial misconduct prejudicial to the petitioner; and (6) trial court's refusal to comply with the jury's request that petitioner's and petitioner's witnesses' testimony be read to them.

The Court holds that the above alleged trial errors did not, either individually or cumulatively, deny petitioner of any specific constitutional protection nor were so prejudicial as to amount to a denial of due process. See, *Manning* v. *Rose,* 507 F. 2d 889, 892-893 (6th Cir. 1974).

First, assuming that the trial court's order pursuant to Ky. R.Cr. 7.24(1)(a) required pre-trial disclosure of petitioner's incriminatory oral statement to Officer Martin, the petitioner has failed to show with any particularity how he was prejudiced by the Court's ruling denying a continuance. Instead, the record reveals that the petitioner on cross-examination explained the reason why he made the statement, and the Court fails to see how a continuance could have been of any benefit to the petitioner. Whether to grant a continuance is a matter within the sound discretion of the trial judge, and we do not find that he abused that discretion in this case.

With regard to the allegation that the prosecutor was allowed to "parade the victims" of other crimes with which petitioner was charged before the jury, the Court finds that there is no evidence whatsoever on the record, nor any assertion to the effect, that the jurors, or any one of them, were made aware of the identity, or relationship to the case, of the two women named in other counts of the indictment, which were not the subject of the instant trial, who appeared pursuant to a subpoena by the Commonwealth on the first day of trial. This case is easily distinguishable from that cited by petitioner, *Turpin* v. *Commonwealth,* 352 S. W. 2d 66 (Ky. 1961), where other charges pending against the appellant were clearly brought to the

attention of the jury. Thus, the Court holds that the trial court did not err in denying a motion for a mistrial on the basis that two women, who were named victims of other counts of the indictment against the petitioner, were present in the courtroom.

The third and fourth errors that petitioner contends were committed by the trial court concern rulings on the admissibility of evidence. We take cognizance that the admission of evidence in a state trial may raise a constitutional question on a habeas corpus petition where "fundamental fairness" has been impugned, see, e.g., *Lisenba* v. *California,* 314 U. S. 219, 236, reh. den., 315 U. S. 826 (1941); *Maglaya* v. *Buchkoe,* 515 F. 2d 265, 268 (6th Cir.), cert. den., 423 U. S. 931 (1975); *Burks* v. *Egeler,* 512 F. 2d 221, 223 (6th Cir.), cert. den., 423 U. S. 937 (1975), but the Court finds that the trial court did not abuse its discretion by refusing to admit the two pieces of evidence in controversy.

As regards Dr. Templer's testimony, the effect of that testimony would have been that the petitioner did not have the personality type nor the low intelligence typical of the normal rapist. It was not established on avowal, however, that the personality type or intelligence of the "normal rapist" is a matter of general acceptance among psychologists. As the Ninth Circuit pointed out in *United States* v. *Amaral,* 488 F. 2d 1148, 1152 (9th Cir. 1973), in connection with proffered expert testimony concerning the credibility of eyewitness identifications, because expert testimony runs the risk of having an aura of special reliability or trustworthiness, courts have imposed the test that the testimony comport with a generally accepted explanatory theory, and the trial judge is given broad discretion in balancing the probative value of the tendered expert testimony against its influence on the jury. Therefore, we hold that the trial court did not abuse its discretion, nor commit constitutional error, in refusing to permit Dr. Templer's testimony.

Further, it is clear that the reliability of lie detector tests has not yet been firmly enough established to hold that a trial court's refusal to admit the results of these tests constitutes a denial of due process such as will support a habeas corpus petition. See *United States* v. *Fay*, 284 F. 2d 426 (2nd Cir. 1960), cert. den. *sub nom Sadowy* v. *Fay*, 365 U. S. 850 (1961).

Fifth, petitioner claims that he was denied a fair trial because of certain acts of alleged prosecutorial misconduct, to wit: (1) indicating that petitioner's alibi witness did not leave work until later than the time to which she testified, without later substantiating that implication, (2) referring to the offense charged as a "bona fide rape," (3) directly addressing a juror who sought to ask a question of a witness, (4) asking petitioner's alibi witness whether she occasionally called in sick for petitioner at his place of employment, (5) asking petitioner's alibi witness questions that might imply that she had been coached or encouraged to come up with an alibi for petitioner by petitioner's counsel, and (6) arguing in closing that the jurors should not acquit due to fear of repercussions if they found petitioner guilty.

While we find some of the above acts, notably (1) and (6), somewhat reprehensible, we hold that none of them, individually or cumulatively, were so prejudicial as to arise to a constitutional deprivation of a fair trial. Moreover, the discrepancy brought out in regard to (1) was not damaging to petitioner's alibi defense, as he himself brought out after further questioning on cross-examination, and the remark referred to in (3) was addressed to the witness, not the juror.

Finally, after carefully reviewing the record, the Court finds that the trial court did not refuse to comply with the jury's request for a rereading of petitioner's and petitioner's witnesses' testimony, but demonstrated a willingness to reread all portions of the transcript that the jury,

after further deliberation, determined it needed. Thus, *United States* v. *Rabb*, 453 F. 2d 1012 (3rd Cir. 1971), is not authority for petitioner's position.

CRUEL AND UNUSUAL PUNISHMENT

Petitioner was sentenced by the jury to life without possibility of parole for rape of a female over 12, pursuant to K.R.S. 435.090, which provided for any of the following punishments: death, life without privilege of parole, life, or 10 to 20 years. He maintains that his sentence of life without parole is cruel and unusual in violation of the Eighth and Fourteenth Amendments, as interpreted in *Furman* v. *Georgia*, 408 U. S. 238, reh. den., 409 U. S. 902 (1972). In support of his argument, petitioner states that he had no prior criminal record, that the new Kentucky Penal Code, effective January 1, 1975, in K.R.S. 510.040, makes the penalty for the type of rape of which he was convicted 10 to 20 years, and that life without parole for rape, without other bodily injury, is "offensive to contemporary standards of decency."

In five recent post-*Furman, supra*, decisions, all decided July 2, 1976, *Gregg* v. *Georgia*, No. 74-6257; *Jurek* v. *Texas*, No. 75-5394; *Woodson* v. *North Carolina*, No. 75-5491; *Proffitt* v. *Florida*, No. 75-5706; and *Roberts* v. *Louisiana*, No. 75-5844, the Supreme Court has reviewed the death penalty provisions of various states in light of the Eighth Amendment's prohibition of cruel and unusual punishment. The three tests articulated in the Stewart, Powell and Stevens opinion, announcing the judgment of the Court in *Gregg, supra*, at p. 16, for determining whether a punishment is cruel and unusual are the following: (1) Does the punishment involve the unnecessary and wanton infliction of pain or is it *per se* excessive or otherwise unacceptable? (2) Is the punishment grossly out of proportion to the severity of the crime? (3) With regard to the death penalty, are there clear and objective standards to guide the

sentencing body, which standards take into account the circumstances of the offense and the character and propensity of the offender?

Obviously, since only two members of the Supreme Court would have held that the death penalty was *per se* excessive and unacceptable by contemporary standards, we do not find that life without parole is *per se* unacceptable. Nor do we feel that life without parole is grossly disproportionate to the crime of rape, despite the fact that the 1974 Kentucky Legislature saw fit to lower the penalty for first degree rape.

Inasmuch as K.R.S. 435.090 gave the jury a wide range of punishments to choose among without any objective criteria to be used in making the choice, if the third test enunciated by the Court in *Gregg, supra,* were applicable to punishments other than the death penalty, petitioner's punishment would have to be vacated as violative of the Eighth and Fourteenth Amendments. However, the following language at pp. 23-24 of the Stewart, Powell and Stevens opinion in *Woodson, supra,* convinces us that this is not the position of the Supreme Court.

> "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy *rather than a constitutional imperative*, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death."
>
> "This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long." (Emphasis added.)

In addition, while the Court in *Woodson, supra,* and *Roberts, supra,* ruled that statutes making the death penalty mandatory for specified crimes violate the Eighth and Fourteenth Amendments, in *Walters* v. *California,* 425 U. S. 967 (1976), the Court dismissed without opinion an appeal raising, in part, the question of whether a California statute making life without parole mandatory for kidnapping with bodily injury, was cruel and unusual "for want of substantial federal question."

We understand that the United States Court of Appeals for the Sixth Circuit is now considering an appeal from two judgments entered by the Honorable Chief Judge Rhodes Bratcher, in the Western District of Kentucky, dismissing claims made by habeas corpus petitioners that a life sentence without parole for the offense of rape constitutes cruel and inhuman punishment under the Eighth Amendment, and violates the Equal Protection rights of the petitioners who are black and who allege that this punishment has been discriminatorily levied against blacks.

We believe, therefore, in the exercise of the utmost caution and in the interest of judicial economy, that it would be best, at this time, to defer any judgment with respect to the Eighth Amendment claim of the petitioner. We understand that the two cases now pending in the Sixth Circuit will be argued orally at the April, 1977 term, and we probably can expect a definitive opinion from that court in the late spring or early summer of this year.

With reference to the claim of Equal Protection raised by the petitioner in the case at bar, we note that he did not expressly raise this question in the state courts and we do not consider this issue at this time because of his failure to exhaust state remedies.

An interlocutory judgment in accordance with this opinion has been entered this day.

Date 3-23-77

(s) Charles M. Allen
United States District Judge

cc: Counsel of Record

APPENDIX A-3

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 76-0040 L(A)

MICHAEL RAY STANDARD, - - - - - *Petitioner,*

v.

HENRY E. COWAN, Superintendent, Kentucky State Reformatory, - - - - - *Respondent.*

JUDGMENT—Entered September 8, 1977

The Court, having previously entered a partial summary judgment for respondent, and having entered its memorandum opinion, and being fully advised in the premises,

IT IS NOW ORDERED AND ADJUDGED that, respondent is granted summary judgment with reference to all issues advanced by the petitioner in support of his application for a writ of habeas corpus.

IT ISFURTHER ORDERED AND ADJUDGED that this is a final and appealable judgment and there is no just cause for delay.

Dated 9/8/77

(s) Charles M. Allen
United States District Judge

cc: Counsel of Record

MEMORANDUM OPINION—Entered September 8, 1977

This Court previously entered a memorandum opinion and partial summary judgment in this habeas corpus action filed by the petitioner, Michael Ray Standard. The Court specifically reserved the question of whether or not a life sentence without parole for rape without other bodily injury is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Court reserved judgment because of the pendency of four cases raising the same point in the United States Court of Appeals for the Sixth Circuit, which have now been decided under the name of *Alton Moore, Jr.* v. *Henry E. Cowan, Warden,* Nos. 76-1859, 76-1889, 76-2377, 76-2378, on August 26, 1977. In *Moore* the court held that the no-parole sentence does not constitute cruel and unusual punishment, nor is it unconstitutional because it applied to one sex only.

In reaching its conclusion, the court relied upon the reasoning of *Schick* v. *Reed,* 419 U. S. 256 (1974) and to the statement made at p. 267, which is as follows:

> "The no-parole condition attached to the commutation of (petitioner's) death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or *statutes otherwise precluding parole; it does not offend the Constitution.* 419 U. S. 256, 267 (emphasis added)."

We note with some interest that the court, in *Moore, Jr.* v. *Cowan, Warden, supra,* did not refer to *Coker* v. *Georgia,* No. 75-5444 decided June 29, 1977, where the Supreme Court concluded that a sentence of death with respect to the rape of an adult woman "is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Coker* did not, of course, reach the question

of a life sentence without parole for the offense of rape and, therefore, is not in point here. We do point out, however, that Mr. Justice White, at pp. 12 and 13 of the plurality opinion, states that the court does not discount the seriousness of rape as a crime. We note also his statement that "(s)hort of homicide, it is the 'ultimate violation of self'" and that it is often accompanied by physical injury to the female and can also inflict mental and psychological damage, as well as undermine the community's sense of security.

In light of the decision of the Sixth Circuit in *Moore, Jr.* v. *Cowan, Warden, supra,* we hold that the life sentence without parole for the crime of rape does not violate the Eighth Amendment to the Constitution. *Moore, Jr.,* is controlling on us in the absence of a Supreme Court case deciding the point and there is no such case.

We have this day entered judgment disposing of this case.

Dated 9/8/77

(s) Charles M. Allen
United States District Judge

cc: Counsel of Record

APPENDIX A-4

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-3574

MICHAEL RAY STANDARD - - *Petitioner-Appellant*

v.

HENRY E. COWAN, Superintendent - *Respondent-Appellee*

ORDER—Filed August 16, 1978

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

On receipt and consideration of a petition for rehearing en banc: and

No active judge having moved for such hearing; and

The motion having been referred to the panel which heard the appeal; and

Finding in the petition no argument advanced which this court had not considered before entry of its order,

Said petition is hereby denied.

Entered by order of the Court
John P. Hehman, Clerk
(s) Grace Keller, Chief Deputy

ORDER—Filed July 3, 1978

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges

On receipt and consideration of an appeal from denial of a petition for writ of habeas corpus, under 28 U.S.C. § 2254 (1970); and

Noting that petitioner had been convicted on a number of charges, the most serious of which was the charge of rape, for which appellant received a sentence of life, without possibility of parole; and

Further noting petitioner's claim that he had been denied his Sixth Amendment right to counsel, in violation of *Massiah* v. *United States*, 377 U. S. 201 (1964) and *Brewer* v. *Williams*, 430 U. S. 387 (1977), but on inspection of the record having ascertained that the statement which was introduced at petitioner's trial and to which he now objects was made before his indictment and was not the product of interrogation or police stimulation, *Cf. Brewer* v. *Williams, supra;* and

Noting further that the penalty of life without possibility of parole for the crime of rape has thus far never been held to be cruel and unusual punishment, which was prohibited to the states by the Eighth Amendment. *Cf. Coker* v. *Georgia*, 433 U. S. 584 (1977), *see Moore* v. *Cowan*, 560 F. 2d 1289 (6th Cir. 1977),

Now, therefore, the judgment of the District Court is affirmed.

Entered by order of the Court
(s) John P. Hehman
Clerk